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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 356 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

GARDEN SILK WEAVING FACTORY

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR J P SHAH, Advocate, for applicant.
MR BHARAT J SHELAT, instructed by
MR MANISH R BHATT, Advocate, for respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 24/01/97

ORAL JUDGEMENT (Per R. Balia, J)

The questions referred to this Court relates to the assessment year 1969-70. At the instance of the assessee the following three questions have been referred to this Court for its opinion, arising out of the Tribunal's order in ITR No.1160/Ahd/1979.

"1. Whether on the facts and circumstances of the case, the Tribunal was right in law in adding the amount of Rs.67,500/- by way of deemed income in the assessment of the assessee?

2. Whether on the facts and in the circumstances of the case, the finding that the payment of Rs.67,500/- was in fact made and that it was made by Suresh Patel or by the assessee is without evidence or if with evidence is perverse or partly based on conjectures and therefore, bad?

3. Whether the assessee is entitled to carry forward of unabsorbed depreciation ?

2. While questions no .1 and 2 relates to addition of Rs.67,500/- by way of deemed income of the assessee for the previous year relevant to the assessment year in question, on the basis that the amount paid towards goods imported under the Import Licence were not satisfactorily explained by the assessee to explain the source of fund utilised for import and the third question relates to disallowing the assessee firm to carry forward of unabsorbed depreciation of earlier years which while allocating shares to partners in the profit of the business at the close of the year was shown as distributed amongst the partners.

3. So far as question no. 3 is concerned, learned counsel for the parties are in agreement that in view of the decision of the Supreme Court in the case of Garden Silk Weaving Factory V. C.I.T. reported in 189 ITR 512, it is required to be answered in affiramtive in favour of assessee. We accordingly do so.

4. So far as the questions no.1 and 2 are concerned, we may notice facts relevant for the purpose. During the course of assessment proceedings the Income-tax Officer noticed that the assessee had received import licence bearing No.P/E 2568396 of value of Rs.8,402/- which was altered to Rs.68,402/-. On this licence the goods were imported in April 1968 from German firm during the previous year in question of value for Rs.67,500/-. These goods were confiscated by the Customs Authority before they were cleared from the port on noticing discrepancy in the import licence. It was contended before the Income-tax Officer that the assessee had neither advanced nor paid any amount towards the goods so imported and that they were purchased on credit and no payment has been made to the said party till today by the assessee. The I.T.O. rejected the assessee's explanation by holding that it is customary that such goods are always sent through Bank and no sooner they are received in the dock the papers are to be cleared through the Bank after making necessary payment towards the cost of goods. The assessee must have paid an amount of Rs.67,500/- in the bank during that period before obtaining the documents. In view of this, the amount of Rs.67,500/- was added to the income of the assessee as income from undisclosed sources.

5. Before the CIT (Appeals), it was sought to be argued by producing the letter from the Bank that no transaction has taken place through Bank to contend that the conclusion about payment through Bank was not justified. The assessee has also produced the contract form which disclosed that the payment was to be made by the assessee firm against the documents. In his letter dated 14-2-73 addressed to I.T.O. the assessee referring to his statement before the Custom Authority it was explained that these documents were not paid for by us. They were arranged to be sent by one Suresh Patel of Manchester, U.K. The statement of one of the partners Suresh A. Shah was recorded before the Custom Officer which was on record as is apparent from the first appellate order dated 25-3-1974, which was ultimately set aside by the Tribunal and the matter was remanded. According to said statement before Customs Officers said

partner of the firm Sureshbhai Shah has admitted that the payments of the goods were arranged by one of his friend Suresh Patel in U.K. Considering the assessee's plea that the amount for delivery of documents has been paid through one Sureshbhai A Patel of U.K., and documents have been released on payment the Tribunal held that that it was duty of the assessee to explain source of payment made to the German firm sending the goods to the assessee, it concluded that alleged payment by Suresh A. Patel is akin to case of cash credit, which the assessee has to explain. It further concluded that in the absence of satisfactory explanation about the source of payment for goods imported under the licence in favour of the asseessee the Income-tax Officer was justified in considering this amount as appellant's income from undisclosed source. The Tribunal has also referred to the fact that when the appellant was asked to explain source of the fund utilised for importing the aforesaid goods, one the partner of the assessee firm Suresh A Shah, stated that payment for these goods has been made by one of his friend, Suresh Patel of Manchester, U.K.. The assessee firm, however, did not give any further details about the transaction. The assessee firm has, not produced any confirmation letter from Suresh Patel that he had paid the requisite amount for securing the relevant documents from his own funds. The assessee firm does not appear to have even furnished the complete address of Suresh Patel to the Income-tax Officer. There is, in fact, no evidence to establish even the existence of such a person. A bald ascertion unsupported by any evidence whatsoever by a partner of the assessee firm that the payment had been made by one of his friends in the U.K. does not carry any conviction. In the circumstances, it held that the source of the amount utilised for obtaining the relevant documents by the assessee firm from the German firm remains completely unproved and the Commissioner (Appeals) was justified in confirming the addition of Rs.67,500/- made by the Income-tax Officer as the assessee's income from undisclosed sources.

6. It was urged by the learned Advocate for the assessee firm that the finding about payment having been made by the assessee is based on presumption and not on positive proof the assessee cannot be held liable for addition of such income by way of considering it to be unexplained investment under Section 69A of the Income-tax Act, 1961 and the assessee having not been subjected to the inquiry u/s 69A of the Income-Tax Act, 1961 about the ownership of the goods, it cannot be invoked. In other words, the assessee's case was that

unless it is found that the investment made by the assessee which has not been recorded in the books of A/c. there cannot be any burden of proof on the assessee to explain source of such investment and there being no evidence about actual payment by the assessee the finding that the payment of Rs.67,500/- was in fact made is without any basis.

7. In the facts and circumstances of the case, we are unable to accept the contention of the assessee as it will be noticed from the facts stated above, the inquiry of utilization of fund related to the import of Nylon yarn under the import licence the ownership of which factually undisputedly and undeniably vested in the assessee. It is also not in dispute that the payment towards the goods imported from German Company under the said import licence had been made. It is not the case of the assessee anywhere that the amount which was paid by Sureshbhai A Patel is still to be paid to Suresh A Patel and appears in his books of account as liability to be discharged. Therefore, it was a clear case of payment in respect of the goods imported by the assessee under the terms of the agreement and the inquiry was directly related to the source of fund utilised for importing the goods under the import licence for which payment admittedly having been made to discharge the consideration under the agreement for obtaining the documents for delivery and such documents did reach the assessee. Obviously, in such circumstances, unless it was satisfactorily proved by the assessee that the payment was made by somebody on his behalf it cannot be said that the tribunal was unreasonable in drawing inference about the unsatisfactory nature of explanation furnished by the assessee to which no man of ordinary prudence could reach. In other words, rejection of assessee's explanation and finding that assessee must have paid the money out of his sources for release of documents under which goods were imported cannot be terms as perverse or based on irrelevant consideration, so as to make it open for us to reexamine the issue of fact by not accepting the fact found by the Tribunal as final. In view of the categorical statement in the order of the Tribunal that the assessee was required to explain source of fund utilised for importing the goods reasonably leads to infer that the entire inquiry was directed to find source of acquisition of goods under the import licence (which was not genuine). Clear finding of the Tribunal on the basis of the material before it was on the basis of the provisions of Section 69A of the Income-tax Act and not under Section 69. Since under section 69A onus is on the assessee to prove source of acquisition of any

article or thing found to be of assessee's ownership rests on the assessee and as the explanation about source of of fund utilised by the assessee for securing release of documents, namely payment through Suresh A. Patel, was not found satisfactorily addition was sustainable u/s 69A. It may be noticed that payment was to be made against delivery of documents. Delivery of document is not in dispute. It is also not in dispute that such documents did reach assessee. In these circumstances, it is immaterial whether due to intervention of law the goods covered under such documents did not actually reach the assessee. The real issue was acquiring of delivery of documents on payment under which goods could be taken delivery off.

8. It was sought to be argued before us that the finding about the actual payment by the assessee is perverse. We may point out that no authority has found that the actual payment has been made by the assessee. Whatever finding by the CIT (Appeals) and the Tribunal is that the actual payment to discharge the liability of paying consideration under the import contract has been made. This facts emerges from assessee's own admission which is not disputed before us. Therefore, in the facts of the case, the finding that the payment of Rs.67,500/was made cannot be said to be based not on material or is perverse. So also whether the payment made by Suresh A Patel or the assessee, it is not positively found by any of the authorities as by whom the payment has been made. Since it was for the assessee to prove that the payment which was made for securing delivery of documents in respect of import of goods under licence owned by him was not from his own source but from somebody else, the Income-tax authorities were to decide whether such explanation was acceptable or not without actually establishing that the payment was in fact made by the assessee. In that circumstance, it was for the assessee to place cogent material in support of his statement that the payment has been made by Suresh A Patel and not by him. If the explanation did not arise confidence of the assessing authoirty than the assessee failed to discharge his burden of proving a fact satisfactory, burden of which lay or him. On such failure on the part of assessee additions are necesary consequences.

9. We accordingly hold that the finding of fact does not call for interference by this Court and answer questions no.1 referred to above in affirmative i.e. in favour of the revenue and against the assessee and question no.2 in negative i.e. in favour of the revenue

and against the assessee.

10. Accordingly, this Reference No.356 of 1983 stands disposed of, with no order as to cost.

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